

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

2010 MTWCC 13

WCC No. 2009-2342

PATRICIA FLEMING

Petitioner

vs.

MONTANA SCHOOLS GROUP INSURANCE AUTHORITY

Respondent/Insurer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Summary: Petitioner sustained an injury on May 4, 2007, while working for Respondent's insured. Respondent initially accepted liability. Respondent denied further liability after receiving an unsolicited opinion from an IME physician who opined that Petitioner's condition was a temporary aggravation of a preexisting condition. Petitioner contends that Respondent unreasonably denied further liability.

Held: Petitioner suffered a permanent aggravation of her preexisting condition. Respondent is liable for payment of further benefits associated with Petitioner's permanent aggravation. The IME physician's written opinion that Petitioner did not suffer a permanent aggravation of her preexisting condition is inconsistent with his deposition testimony. Respondent's denial was not unreasonable because it attempted to obtain Petitioner's treating physicians' opinions about the IME report prior to denying liability.

¶1 The trial in this matter was held on March 1, 2010, in Kalispell, Montana. Petitioner Patricia Fleming (Fleming) was present and represented by David M. Sandler. Respondent Montana Schools Group Insurance Authority (MSGIA) was represented by Jason B. Jewett.

¶2 **Exhibits:** Exhibits 1 through 4 were admitted without objection.

¶3 **Witnesses and Depositions:** The depositions of Fleming, Atul Patel, M.D., and Henry H. Gary, M.D., were taken and submitted to the Court. Fleming and Katy Howell (Howell) were sworn and testified at trial.

¶4 Issues Presented: The Pretrial Order states the following contested issues of law:

- ¶ 4a Whether Fleming suffered a new injury or a permanent aggravation of her pre-existing low back condition within the course and scope of her employment with Evergreen School District No. 50 on May 4, 2007, or whether the aggravation was only temporary.
- ¶ 4b Whether MSGIA is required to pay additional workers' compensation benefits.
- ¶ 4c Whether MSGIA has been unreasonable in denying further liability for additional benefits.¹

FINDINGS OF FACT

¶5 I found the trial testimony of Fleming and Howell to be credible.

¶6 On or about May 7, 2007, Fleming filed a First Report of Injury or Occupational Disease, alleging that she injured her low back, neck, and right wrist in the course and scope of her employment with Evergreen School District No. 50 on May 4, 2007.²

¶7 On May 4, 2007, Evergreen School District No. 50 was insured by MSGIA.³

¶8 Fleming has taught school since 1980. She primarily teaches Physical Education (P.E.) and Health to elementary school children. Prior to her May 4, 2007, accident, Fleming actively participated in the P.E. classes she taught.⁴

¶9 Fleming enjoyed an active lifestyle prior to her accident. She participated in running, horseback riding, tennis, and snow skiing. Fleming testified that two weeks prior to the accident, she ran between two and three miles every other day.⁵

¶10 In January 2004, Gregory D. Pisk, D.C., treated Fleming for neck pain. Dr. Pisk noted that Fleming's pain was not related to a specific accident or injury. Dr. Pisk diagnosed Fleming with mild degenerative changes at C5-6 with minimal cervical curve

¹ Pretrial Order at 3.

² Uncontested Fact 1, Pretrial Order at 2.

³ Uncontested Fact 2, Pretrial Order at 2.

⁴ Trial Test.

⁵ Trial Test.

from C5-T5. A June 11, 2004, MRI was significant for a broad-based disk protrusion to the right at C5-6.⁶

¶11 Kathleen D. White, PA-C, examined Fleming on July 13, 2004. PA-C White reviewed her findings with Robert F. Hollis, M.D., and diagnosed Fleming with cervicgia, degenerative disk disease, cervical spondylosis, and right cervical foraminal stenosis. PA-C White ordered an EMG and nerve conduction studies to evaluate Fleming's nerve function. PA-C White prescribed Fleming physical therapy (PT), Ibuprofen, and Percocet.⁷

¶12 On August 2, 2004, Fleming complained of low-back pain to Dr. Pisk.⁸ Fleming followed up with Dr. Hollis on August 17, 2004. Fleming reported to Dr. Hollis that she had lifted an object and twisted her back at some point between visits to Dr. Hollis' office. Dr. Hollis maintained that Fleming suffered mostly from cervicgia with associated low-level myospasm.⁹

¶13 In an effort to avoid surgery and epidural steroid injections, Fleming participated in PT. Physical therapist Susan Brakefield (Brakefield) evaluated Fleming on August 23, 2004.¹⁰ Brakefield recommended PT treatment three times a week to alleviate Fleming's pain symptoms. Brakefield's prognosis was guarded due to Fleming's "very active and strenuous work environment."¹¹ Brakefield discharged Fleming after eleven treatments. Brakefield's discharge report states that although Fleming's low-back pain "improved dramatically," her cervical spine continued to be a problem.¹²

¶14 On September 30, 2004, Fleming expressed frustration to Dr. Hollis that she needed to take a painkiller prior to teaching her P.E. class. Dr. Hollis suggested that Fleming find a chronic pain manager. Dr. Hollis opined that Fleming might be a surgical candidate for intervention at C5-6; however, he also stated that due to her multilevel condition, surgery could lead to adjacent wear patterns.¹³

⁶ Ex. 2 at 65.

⁷ Ex. 2 at 2.

⁸ Ex. 2 at 70.

⁹ Ex. 2 at 12.

¹⁰ Ex. 2 at 72.

¹¹ Ex. 2 at 73.

¹² Ex. 2 at 75.

¹³ Ex. 2 at 14.

¶15 Dr. Hollis referred Fleming to Steven M. Martini, M.D. Dr. Martini examined Fleming in January of 2005.¹⁴ Dr. Martini diagnosed Fleming with spondylosis at L5-S1 with a high intensity zone lesion and a mild disk bulge.¹⁵

¶16 On February 8, 2005, Dr. Martini offered Fleming epidural corticosteroid injections in her cervical and lumbar regions because Fleming had maximized her PT regimen.¹⁶ After receiving the corticosteroid injections, Fleming initially reported a reduction in pain in both the cervical and lumbar region.¹⁷ On March 21, 2006, Fleming reported that her lumbar region continued to be painful.¹⁸

¶17 Fleming followed up with Dr. Martini throughout 2006. Fleming's lumbar pain fluctuated during this period of time and she continued taking oxycodone, Percocet, Cymbalta, Topamax, Zanaflex, and Robaxin.¹⁹

¶18 Fleming received an epidural steroid injection on December 18, 2006, in the cervical and lumbar spinal regions. On January 10, 2007, Tim Thornton, PA-C, examined Fleming. Fleming reported that the cervical spine injection had been successful, but the lumbar spine injection had been unsuccessful. PA-C Thornton refilled Fleming's prescriptions for OxyContin, Percocet, Robaxin, and Celebrex.²⁰

¶19 On April 19, 2007, fifteen days prior to Fleming's industrial accident, Christopher Rost, PA-C, examined Fleming and noted that her "pain has leveled off" and that she was "content to carry on with the current regimen." PA-C Rost noted that Fleming exhibited no pain behaviors, and had a normal gait. PA-C Rost stated that he saw "no reason to pursue further diagnostics or interventions." Fleming scheduled a follow-up visit with PA-C Rost for a month later.²¹

¶20 On May 4, 2007, Fleming collided with a 180-pound eighth grade student while participating in a P.E. class game. Fleming was knocked to the ground and landed on her right side, hitting her head and wrist on the ground.²²

¹⁴ Ex. 2 at 98.

¹⁵ Ex. 2 at 99.

¹⁶ Ex. 2 at 111.

¹⁷ Ex. 2 at 112.

¹⁸ Ex. 2 at 118.

¹⁹ Ex. 2 at 117-25.

²⁰ Ex. 2 at 126-27.

²¹ Ex. 2 at 129.

²² Trial Test.

¶21 Fleming testified that the pain she experienced after the May 4, 2007, accident, was different than the low-back pain she experienced prior to the accident. Fleming described the new pain as “a lightning bolt shock.”²³

¶22 Although Fleming continued teaching P.E. the rest of the year, she was unable to actively participate in class as she had previously done.²⁴

¶23 Fleming spoke with MSGIA claims examiner Katy Howell (Howell) after the May 4, 2007, accident. Howell informed Fleming that she would need to see a medical doctor rather than a physician’s assistant for treatment of her injury.²⁵

¶24 On May 15, 2007, PA-C Rost examined Fleming at the previously scheduled follow-up visit.²⁶ Fleming informed PA-C Rost about the industrial accident and Howell’s requirement that Fleming see a medical doctor for treatment of her injury.²⁷

¶25 R. Dennis Winkel, M.D., examined Fleming on May 21, 2007. Fleming reported to Dr. Winkel that she was injured at school when she was knocked down by a student. Dr. Winkel’s treatment note reflects that Fleming experienced an exacerbation of her chronic back pain, with more pain in the right sacroiliac (SI) region.²⁸ Dr. Winkel increased Fleming’s OxyContin dosage and prescribed Percocet for breakthrough pain.²⁹

¶26 On July 18, 2007, Howell requested Dr. Winkel’s opinion regarding Fleming’s claim. Dr. Winkel opined that Fleming’s accident exacerbated her chronic low-back pain, but that he expected the exacerbation to be temporary. Dr. Winkel stated that Fleming’s low-back pain had returned to pre-exacerbation baseline, but that she had “developed some right flank pain of undetermined etiology, possibly related to her fall.”³⁰ He also opined that Fleming did not sustain a permanent impairment as a result of her accident.³¹

²³ Trial Test.

²⁴ Trial Test.

²⁵ Trial Test.

²⁶ Ex. 2 at 130.

²⁷ Trial Test.

²⁸ Ex. 2 at 91.

²⁹ Ex. 2 at 92.

³⁰ Ex. 2 at 95.

³¹ Ex. 2 at 96.

¶27 On August 14, 2007, Dr. Winkel sent a follow-up letter to Howell. Dr. Winkel retracted his previous opinion that Fleming had returned to pre-exacerbation baseline with the exception of right flank pain. Dr. Winkel stated that his initial opinion was based on limited information regarding Fleming's status. In his August 14, 2007, letter, Dr. Winkel opined that Fleming had not yet returned to pre-exacerbation baseline and that he was "unable to determine when or if she will return to preexacerbation levels of activity."³²

¶28 On February 5, 2008, a panel independent medical examination (IME) was conducted. The panel physicians included Catherine C. Capps M.D., and Henry H. Gary, M.D. Dr. Capps' specialty is orthopedics. Dr. Gary's specialty is neurosurgery.³³ The panel reviewed Fleming's medical records, interviewed Fleming, and performed a physical examination.³⁴

¶29 The panel concluded that Fleming had experienced an exacerbation of chronic low-back pain with new L5 radicular symptoms as a result of her accident.³⁵ The panel noted that Fleming had "historical and subtle examination findings of an L5 radicular syndrome, which was not described previously in the medical records."³⁶ The panel concluded that Fleming may have aggravated her SI joint pain due to the accident. The panel concluded that the aggravation of Fleming's low-back pain and possible new L5 radicular symptoms were related to her industrial accident and noted that, "It is impossible to determine whether [the aggravation] is permanent or temporary."³⁷ The panel stated that at the time of the IME, the aggravation was not temporary and Fleming was not at baseline.³⁸ The panel further opined that Fleming was not at maximum medical improvement (MMI).³⁹

¶30 The panel recommended that Fleming have a bone scan and a new MRI to further evaluate her condition prior to the panel making treatment recommendations.⁴⁰ An addendum to the panel's initial report was attached on March 25, 2008. The addendum states:

³² Ex. 2 at 97.

³³ Ex. 2 at 29.

³⁴ Ex. 2 at 29-41.

³⁵ Ex. 2 at 39; Gary Dep. 40:4-18.

³⁶ Ex. 2 at 40.

³⁷ Ex. 2 at 39.

³⁸ *Id.*

³⁹ Ex. 2 at 40.

⁴⁰ *Id.*

The MRI of the lumbar spine and the SPECT bone scan requested at the time of the Panel Evaluation has [sic] been reviewed. There are changes, with an increase in uptake at the L5-S1 disc space on the right, and the MRI has shown some progressive degeneration since 3/29/06, with significant increase in loss of disc space height. There is no progression of herniated disc, however, there may be some lateral recess and neuroforaminal stenosis secondary to this disc space loss.⁴¹

In the addendum, the panel again opined that Fleming had not achieved MMI and recommended that she be referred to a neurosurgeon for evaluation of surgical options.⁴²

¶31 During a deposition taken during this case's litigation, IME panel member Dr. Gary agreed that Dr. Winkel's increase in Fleming's OxyContin dosage after the injury was significant.⁴³ Dr. Gary opined that Fleming did not embellish her symptoms during the IME.⁴⁴ Dr. Gary opined that injuries can accelerate ongoing degenerative changes and that in Fleming's case, her May 4, 2007, accident was probably a factor in her degenerative changes.⁴⁵

¶32 Dr. Gary testified that the results of Fleming's SPECT scan, which showed increased uptake at L5-S1 disk space on the right, correlated with the symptoms Fleming presented to the panel.⁴⁶ Dr. Gary stated that at the time of the IME, he was unable to conclude whether Fleming's aggravations were temporary or permanent because the IME took place eleven months after the accident and Fleming had yet to have a surgical consultation. Dr. Gary opined that if a surgeon concluded that Fleming was not a surgical candidate, then her injury would most likely be permanent.⁴⁷ Dr. Gary agreed with Dr. Winkel's opinion that Fleming's May 4, 2007, injury caused a definite exacerbation resulting in increased therapeutic modalities and limited activities.⁴⁸

⁴¹ Ex. 2 at 41.

⁴² *Id.*

⁴³ Gary Dep. 24:6-14.

⁴⁴ Gary Dep. 27:11 - 28:9.

⁴⁵ Gary Dep. 33:16 - 34:12.

⁴⁶ Gary Dep. 39:13-21.

⁴⁷ Gary Dep. 42:18 - 43:11.

⁴⁸ Gary Dep 45:1-9.

¶33 On April 10, 2008, MSGIA unconditionally accepted liability for the exacerbation of Fleming's chronic low-back condition after reviewing her claim file and her medical records, including the panel IME report.⁴⁹

¶34 On July 1, 2008, Dr. Hollis examined Fleming and opined that she suffered from "[c]hronic cervicgia and lumbalgia with occupational injury leading to significant escalation in her pain syndrome which now appears to be chronic in nature."⁵⁰ Dr. Hollis stated that Fleming's pain syndrome resembled symptomatic spondylosis, chronic myospasm, and probable facet syndrome as evidenced by a bone SPECT scan. Dr. Hollis opined that Fleming was not a surgical candidate. Dr. Hollis did not place Fleming at MMI and restricted her work to no lifting, pushing, or pulling over thirty pounds.⁵¹

¶35 Dr. Hollis advised Fleming that living in a warm weather climate would be beneficial to Fleming's conditions. Fleming moved to Arizona in July 2008.⁵² Fleming obtained a new P.E. teaching position, but could not actively participate in the classes. While living in Arizona, Fleming did not participate in the exercise programs and other recreational activities that she had enjoyed prior to her accident.⁵³

¶36 Beginning in September 2008, Fleming sought treatment for her low-back conditions from medical providers at Banner Del E. Webb Medical Center (Banner) in Arizona.⁵⁴

¶37 At the request of MSGIA, Atul Patel, M.D., a physician located in Arizona, performed another IME. In a letter to Dr. Patel, MSGIA requested Dr. Patel's answers to the following questions:

1. In your professional medical opinion, has Ms. Fleming reached maximum medical improvement for her 05/04/2007 work injury? If yes, is the physical therapy considered curative or maintenance at this time?
2. If Ms. Fleming is not at MMI, indicate what treatment will materially improve her condition and when do you anticipate she will reach MMI?

⁴⁹ Ex. 3 at 81.

⁵⁰ Ex. 2 at 23.

⁵¹ *Id.*

⁵² Trial Test.

⁵³ Trial Test.

⁵⁴ Ex. 2 at 140-58.

3. If Ms. Fleming is at MMI, please assess for any permanent impairment that is a direct result of the 05/04/07 injury and assign the impairment rating per the Sixth Edition of the AMA Guides to Permanent Impairment noting table and pages used.
4. If Ms. Fleming is at MMI, indicate what long term medications, future tests or possible surgery would be expected in the future as a direct result of the 05/04/2007 injury.⁵⁵

¶38 Dr. Patel submitted a report to MSGIA on March 2, 2009. In response to MSGIA's question regarding Fleming's MMI status, Dr. Patel opined that Fleming did not suffer a permanent aggravation of her preexisting condition. Dr. Patel further opined that Fleming was at MMI and did not have any impairment rating as a result of her injury.⁵⁶ Dr. Patel testified at his deposition that with regard to both SI joint pain and degenerative disk disease at L5-S1, an aggravation or exacerbation would be temporary if it subsided within three months.⁵⁷ When asked when Fleming returned to her preinjury baseline, Dr. Patel responded that he did not know.⁵⁸

¶39 Howell sent a copy of Dr. Patel's report to Fleming's Arizona treating physicians, requesting their concurrence or disagreement with Dr. Patel's opinions. Diane Seago, F.N.P., of Banner, received a letter from MSGIA asking whether Fleming's treating physicians agreed with Dr. Patel's assessment that Fleming's injuries were temporary aggravations. F.N.P. Seago declined to answer the inquiry because she was unfamiliar with Fleming's baseline prior to her injury.⁵⁹ After Fleming's treating physicians failed to respond to Howell's request, MSGIA denied ongoing treatment as unrelated to her May 4, 2007, industrial accident.⁶⁰

CONCLUSIONS OF LAW

¶40 This case is governed by the 2005 version of the Montana Workers' Compensation Act since that was the law in effect at the time of Fleming's industrial accident.⁶¹

⁵⁵ Ex. 2 at 171-72.

⁵⁶ Ex. 2 at 171.

⁵⁷ Patel Dep. 44:19 - 45:3.

⁵⁸ Patel Dep. 45:13-16.

⁵⁹ Ex. 2 at 157.

⁶⁰ Trial Test.

⁶¹ *Buckman v. Montana Deaconess Hosp.*, 224 Mont. 318, 321, 730 P.2d 380, 382 (1986).

¶41 Fleming bears the burden of proving by a preponderance of the evidence that she is entitled to the benefits she seeks.⁶²

Issue One: Whether Fleming suffered a new injury or a permanent aggravation of her preexisting low-back condition within the course and scope of her employment with Evergreen School District No. 50 on May 4, 2007, or whether the aggravation was only temporary.

¶42 Section 39-71-407(2), MCA, provides in pertinent part:

(2) (a) An insurer is liable for an injury, as defined in 39-71-119, if the injury is established by objective medical findings and if the claimant establishes that it is more probable than not that:

...
(ii) a claimed injury aggravated a preexisting condition.

¶43 Section 39-71-116(19), MCA, defines “[o]bjective medical findings” as: “medical evidence, including range of motion, atrophy, muscle strength, muscle spasm, or other diagnostic evidence, substantiated by clinical findings.”

¶44 Fleming unquestionably suffered from a pre-existing low-back condition prior to her May 4, 2007, accident. PA-C Rost’s medical note is the most contemporaneous indication of Fleming’s condition prior to this accident. Fifteen days prior to the accident, PA-C Rost reported that Fleming demonstrated no pain behaviors and had a normal gait. Fleming informed PA-C Rost that her pain had leveled off. PA-C Rost saw no reason to pursue further diagnostics or interventions. Fleming enjoyed an active lifestyle and actively participated in teaching her P.E. classes. Two weeks prior to the accident, Fleming was running between two and three miles every other day.

¶45 At Fleming’s initial examination following her injury, Dr. Winkel noted that Fleming exhibited decreased range of motion. Dr. Winkel increased Fleming’s OxyContin medication due to her increased pain. The pain Fleming experienced in her low back was different than the pain she experienced prior to the accident. She described the new pain as “a lightning bolt shock.” After the accident, Fleming was unable to run, ride horses, or play tennis, nor was she able to actively participate in the P.E. classes she taught.

¶46 Dr. Gary testified that the results of Fleming’s post-injury SPECT scan correlated with Fleming’s symptoms. Dr. Gary opined that injuries can accelerate ongoing

⁶² *Ricks v. Teslow Consol.*, 162 Mont. 469, 512 P.2d 1304 (1973); *Dumont v. Wickens Bros. Constr. Co.*, 183 Mont. 190, 598 P.2d 1099 (1979).

degenerative changes and in Fleming's case, the injury that resulted from her May 4, 2007, accident was probably a factor in her degenerative changes.

¶47 Fleming established by objective medical findings that she sustained an injury on May 4, 2007. Fleming further established through the totality of the evidence presented that it is more probable than not that her injury permanently aggravated her preexisting condition.

¶48 On August 14, 2007, Dr. Winkel opined that Fleming had not reached pre-exacerbation baseline from the industrial accident. At the time of the panel IME on February 5, 2008, Drs. Gary and Capps opined that it was impossible to determine whether Fleming's aggravation would be temporary or permanent. Dr. Gary clarified in his deposition that if no surgical solution existed for Fleming's condition eleven months after the injury, her condition would most likely be permanent. On July 1, 2008, Dr. Hollis, a surgeon, concluded that Fleming was not a surgical candidate. Dr. Hollis rendered his opinion approximately fourteen months after Fleming's industrial accident.

¶49 Only Dr. Patel opined that Fleming's injury was a temporary aggravation of her preexisting condition. However, Dr. Patel's opinion is internally inconsistent. Although Dr. Patel opined that Fleming did not suffer a permanent aggravation to her preexisting condition, he testified in his deposition that a temporary aggravation or exacerbation of both SI joint pain and L5-S1 degenerative disk disease would subside within three months. When asked when Fleming returned to her preinjury baseline for these conditions, Dr. Patel testified that he did not know. Drs. Gary and Capps opined that Fleming had not returned to baseline in their February 6, 2008, IME report – nine months after Fleming's injury.

¶50 I conclude that Fleming suffered a permanent aggravation of her preexisting low-back condition within the course and scope of her employment with Evergreen School District No. 50 on May 4, 2007.

Issue Two: Whether MSGIA is required to pay additional workers' compensation benefits.

¶51 As the insurer at the time Fleming suffered an injury and permanent aggravation of her low-back condition, MSGIA is required to pay any additional workers' compensation benefits related to her low-back condition.

Issue Three: Whether MSGIA has been unreasonable in denying further liability for additional benefits.

¶52 Fleming argues that MSGIA's denial of liability after initially accepting her claim is unreasonable. Fleming argues that MSGIA's initial acceptance of liability approximately eleven months after Fleming's injury constituted a concession that Fleming's aggravation was permanent and that her injury was established by objective medical findings.

¶53 At the time MSGIA accepted liability for Fleming's claim, no physician had opined that the aggravation of her preexisting condition was permanent. While the fact that MSGIA's inquiry to Dr. Patel did not include a question regarding permanency implies that this issue was resolved, no case law supports Fleming's position that MSGIA's initial acceptance of her claim conceded the permanent aggravation issue. When Dr. Patel offered his unsolicited opinion that the aggravation was temporary, it was not unreasonable for MSGIA to inquire into that matter further. MSGIA did not terminate Fleming's benefits immediately after receiving Dr. Patel's opinion. MSGIA contacted Fleming's Arizona treating physicians, requesting their concurrence or disagreement regarding Dr. Patel's opinion. After Fleming's treating physicians failed to respond, MSGIA denied ongoing treatment as unrelated based on Dr. Patel's opinion. I conclude that MSGIA's denial of further liability for additional benefits was not unreasonable.

JUDGMENT

¶54 Fleming suffered a permanent aggravation of her preexisting low-back condition within the course and scope of her employment with Evergreen School District No. 50 on May 4, 2007.

¶55 MSGIA is required to pay additional workers' compensation benefits.

¶56 MSGIA was not unreasonable in denying further liability for additional benefits.

¶57 Pursuant to ARM 24.5.348(2), this Judgment is certified as final and, for purposes of appeal, shall be considered as a notice of entry of judgment.

DATED in Helena, Montana, this 4th day of June, 2010.

(SEAL)

/s/ JAMES JEREMIAH SHEA
JUDGE

c: David M. Sandler
Jason B. Jewett
Submitted: March 12, 2010